

Supreme Court of the United States

IN THE

OCTOBER TERM, 1979

NO.

79-262

DON ROBERT BARCLAY,

Petitioner,

VS.

STATE OF ALABAMA,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF ALABAMA**

RESPONDENT'S BRIEF IN OPPOSITION

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The respondent State of Alabama respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Court of Criminal Appeals' opinion in this case. That opinion is reproduced in Appendix "A" of the petitioner's brief in support of his petition for certiorari.

STATEMENT OF THE FACTS

The statement of the facts as contained in the opinion of the Court of Criminal Appeals of Alabama is hereby adopted by the respondent with the following additions to the testimony:

Marlin Gentry, a fourteen year old boy, testified that Barclay took him to an old white building, forced him to

consume vodka, attempted to force him to commit fellatio and then forcibly committed sodomy upon the boy. Police officers found a vodka bottle, two glasses smelling of lemon and vodka and a vibrator in the building as Marlin had described them. The walls inside the building were covered with large photographs of naked women. A police officer testified that there was electricity in the building when they searched it. Marlin testified that Barclay had purchased a drink mix and a bag of ice at the Big Bear store; the police found a receipt from Big Bear in the building.

Barclay testified that Marlin drank vodka from the bottle in his automobile without Barclay's knowledge and that Barclay gave Marlin some coffee and took him to the building to sober him up. Barclay denied stopping at a Big Bear store and purchasing the items Marlin described. Barclay said his father had had bursitis in his shoulder years ago and that he had owned a vibrator like the one found in his building behind a broken mirror.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The refusal of a state appellate court to review a constitutional claim not presented to the trial court does not deprive the accused of due process of law.

The Alabama Court of Criminal Appeals' refusal to review the constitutionality of the statute under which the accused was convicted did not deprive the accused of due process of law because the accused failed to raise objection to the statute at his trial. The Alabama rule that an appellate court will not consider any constitutional question not raised below serves the legitimate state interest of avoiding unnecessary reversals and new trials on grounds which could have been corrected if properly brought to the trial court's attention. The constitutionality of §13-1-113, *Code of Alabama 1975* was not raised at any stage of the proceedings below. Thus, this case is distinguishable from *Henry*, where the Mississippi Supreme Court refused to review the admission of evidence obtained during an allegedly improper search because in *Henry* the

accused made objection to the admission of the testimony while there was still time for the trial court to have investigated the facts of the search and to have corrected any error. *Henry v. Mississippi*, 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965). In contrast, the allegation of unconstitutionality was first made here at the appellate level.

If a defendant has an objection, he has an obligation to call the matter to the court's attention so that the trial court will have an opportunity to remedy the situation. An accused may not remain silent at trial and thereafter claim error, even when it reaches constitutional proportions. *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). This court has consistently refused to hear constitutional questions raised for the first time on appeal and has set forth sound reasons for the limitation of appellate review at all levels to the matters properly preserved for appellate review of the record. *Cardinale v. Louisiana*, 394 U.S. 473, 89 S.Ct. 1162, 22 L.Ed.2d 398, 400-401 (1969). The court will give the state courts the first opportunity to consider the legality of a statute attacked on constitutional grounds.

Although upholding state procedural requirements barring appellate review of even constitutional issues in *Henry*, this court remanded *Henry* for the state's determination of the facts of the alleged waiver. In doing so, this court wrote of its intentions to permit the state courts to review the merits of any contention it had erroneously viewed as waived for appellate review purposes. The issue of waiver or of the proper standards to show a waiver is moot here because in its opinion, the Alabama Court of Criminal Appeals effectively reached the merits of the constitutional argument when it noted that the statute had withstood a prior attack on its constitutionality. Thus, even if facts could be presented to show the lack of an effective waiver, the argument would fall on its merits.

This court has recently denied certiorari in other cases to review similar arguments that due process was denied by state rules of procedure which bar appellate review of issues which were not presented to the trial court. See *Collier v. Pennsylvania*, No. 78-1232, cert. den. 47 L.W. 3636 (state rules of procedure barred appellate review of an ineffective

assistance of counsel argument, which was substantiated in part by an allegation that counsel failed to raise the issue of the constitutionality of the statute under which the accused was indicted); *Solomon v. West Virginia*, No. 78-1692, cert. den. 47 L.W. 3801 (due process was not denied by the appellate court's failure to review the admission into evidence of the accused's statement); *Tidmore v. City of Birmingham*, No. 77-1836, cert. den. 47 L.W. 3222 (procedural rules barred the accused from presenting his speedy trial claims for the first time on appeal); *Shuler v. Indiana*, No. 78-122 cert. den. 47 L.W. 3224 (the accused's failure to object to the introduction of his confession at trial waived the issue for appellate review).

II.

The refusal of a state appellate court to review the trial court's oral charge to the jury when there was no objection to the charge made below does not deprive the accused of due process of law.

The Alabama Court of Criminal Appeals' refusal to review the trial court's oral charge to the jury did not deprive the accused of due process of law. Absent plain error, or objection below, this court has also refused to reverse a conviction on the court's oral charge to the jury. *Anderson v. U.S.*, 417 U.S. 211, 41 L.Ed.2d 20, 94 S.Ct. 2253 (1974).

The legitimate state interest of an orderly criminal procedure requires that the accused make known his views as to how the jury should be instructed at the trial level so that the court will be able to deliver an accurate charge, fair to both the accused and the people. When no objection is made to the charge and no plain error is shown, this court will not review the sufficiency of the charge. *Henderson v. Kibbe*, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1978); *Hankerson v. North Carolina*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1978).

Nothing in the record indicates that the accused was prejudiced by the failure of the trial court to charge the jury

concerning the lesser included offenses. Thus, any error of omission in the court's charge would be harmless. The evidence showed that Barclay forced his young victim to drink vodka, attempted to make the boy perform fellatio and then committed an act of sodomy upon the youth. Barclay admitted that he took the boy to a building where he stored a freezer but alleged that the youngster drank his vodka without knowledge. Barclay denied the sodomy.

The trial judge cannot be faulted for not charging on lesser included offenses when the evidence supports the charge as set forth in the indictment. Given the sordid facts testified to in the record, it is inconceivable that the jury would have found the accused guilty of a lesser included offense. Barclay did not allege mistaken identity or alibi, but admitted that he took the victim into a storage building, described by the boy as containing black lights and "real nasty pictures on the wall of ladies", but contended that he took the boy there after he had drunk his vodka and become drunk and sick to give him coffee to sober him up. It is the respondent's contention that the evidence did not warrant the court's charging on lesser included offenses, even had such charges been requested.

Plain error has not been argued. The petitioner had only contended that the trial court has a duty to charge on lesser included offenses. It is the respondent's contention that the evidence did not warrant such charges. This court has recently denied certiorari to review cases expounding arguments that the appellate courts should review the court's oral charge even though objection was not made below. See *Lacey v. U.S.*, No. 77-1751, cert. den. 47 L.W. 3222; *Uriarte v. U.S.*, No. 78-316 cert. den. 47 L.Ed. 3322; *Stirling v. U.S.*, No. 77-1612 cert. den. 47 L.W. 3221; *Hahn - Diguiseppe v. New York*, No. 78-400 cert. den. 47 L.W. 3301; *Lyles v. U.S.*, No. 78-1332 cert. den. 47 L.W. 3636, all of which held that unless plain error is shown, the accused's failure to object to the court's oral charge to the jury precludes appellate review.

Finally, the respondent should point out that the Alabama Court of Criminal Appeals searched the record for error prejudicial to the accused and affirmed his conviction in its absence.

Thus, none of the procedural waivers precluded effective appellate review for plain error or prejudice which would warrant reversal.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of September, 1979, served 3 copies of the foregoing upon counsel of record for petitioner, by placing same in the U.S. mail, postage prepaid and addressed as follows:

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